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SELF-DEFENSE BY ANY OTHER NAME IS STILL SELF-DEFENSE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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SELF-DEFENSE BY ANY OTHER NAME IS STILL SELF-DEFENSE

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For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent attack – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.¹

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.²

I. Introduction

On 1 June 2002, President George W. Bush delivered the graduation speech at the United States Military Academy.³ In it he unveiled his administration's views regarding the pre-emptive use of force in response to imminent attacks against the United States and its citizens.⁴

¹ PRESIDENT GEORGE W. BUSH, NATIONAL SECURITY STRATEGY FOR THE UNITED STATES OF AMERICA, ch. V (Sept. 17, 2002) at <http://www.whitehouse.gov/nsc/nss1.html>.

² U.N. CHARTER art. 51.

³ President George W. Bush, Address at Graduation Exercise of the United States Military Academy (June 1, 2002) at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>

⁴ *Id.*

On 17 September 2002, the Bush administration published its National Security Strategy for the United States of America that further elaborated on the doctrine of pre-emption.⁵ That document expressed the United States' official view on the doctrine stating:

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary act preemptively.⁶

In the ensuing months scholars and policy-makers have debated the legality of pre-emptive self-defense under international law. The discussion has generally been framed in terms that define pre-emptive self-defense as a novel extension of the inherent right of self-defense rather than one that has been invoked throughout history.

This paper examines the concept of “self-defense” under international law. In particular, it addresses the “inherent” nature of the right of self-defense and how that right coexists with the requirement of an “armed attack” as these phrases are used in Article 51 of the United Nations Charter. Is there an internal tension between the language of Article 51 that recognizes a state's “inherent right of self-defense” but also requires an “armed attack” before the right accrues? At what point on the temporal and substantive continuum of an armed attack does the right to self-defense originate? Has

⁵ NATIONAL SECURITY STRATEGY FOR THE UNITED STATES, *supra* note 1, ch. V.

⁶ *Id.*

modern weaponry of mass destruction changed the practical definition of “armed attack” as applied to the concept of self-defense? Is there a distinction between the concepts of “pre-emptive,” “anticipatory” and “interceptive” self-defense or are they simply various ways of describing actions in self-defense which occur during an armed attack prior to the point at which such an attack results in death or destruction within the defender state? Can we reconcile the concept of “imminent danger of attack” found in the U.S. National Security Strategy with that of “armed attack” in Article 51, UN Charter? This paper addresses these questions by tracing the history of self-defense under international law and offering a view of self-defense which incorporates concepts of pre-emptive self-defense in a coherent framework for analyzing a state’s inherent right of self-defense.

A. Hypothetical⁷

Consider the following hypothetical, fictional situation where the pre-emptive use of force in self-defense might be applied.

The People’s Republic of China desires more political, economic, and military influence in Eastern Asia than it currently enjoys. China possesses thermonuclear weapons that it can deliver via intercontinental ballistic missiles to any point within the territory of the United States. After a protracted American military presence in South

⁷ The following hypothetical is not a commentary on Sino-U.S. relations or the future possibility of military confrontation between the two countries. It is used to illustrate an example where two military superpowers, both permanent Members of the United Nations Security Council might create an intractable situation where pre-emptive self-defense would be contemplated and where the power of the veto held by Permanent Members of the Security Council might render irrelevant that organization’s ability to assist in the confrontation.

Korea and Japan of more than fifty years, China determines that one of its primary foreign policy goals is a drastic reduction of the United States' influence in the region. The best way to accomplish this, in the view of the Chinese government, is the total withdrawal of American Forces from South Korea and Japan.

In a bold and entirely unexpected statement to the world, China demands that the United States' government immediately withdraw all of its troops from South Korea and Japan. China further announces that, in the event the Americans do not comply with this requested withdrawal within one year, it is prepared to utilize its extensive nuclear arsenal to force such a withdrawal. In an immediate response, the United States makes a statement re-affirming its existing defense agreements within the region. Under no circumstances will it withdraw American troops from either South Korea or Japan.

In Beijing, hawkish elements within the Chinese government have allied themselves with the hard-line military leadership who believe the United States will ultimately back down on its commitments within the region. Of even greater concern, however, American intelligence indicates the Chinese government is fully prepared to employ their nuclear arsenal to effectuate the desired withdrawal of United States troops if their demand is not met. The Chinese leadership has determined that any nuclear first strike would have to be on a massive scale; otherwise, it would be suicidal. Chinese military leaders have assured their civilian leadership that with an overwhelming first strike, they have the capability to neutralize any potential retaliatory action by American military forces.

Members of the United States' Congress debate the pros and cons of various possible responses to China's threat indicating a present intent and ability to deliver a massive nuclear attack against America. Some leaders caution that since China is a permanent member of the United Nations Security Council, its veto power would render futile any attempt to resolve the crisis utilizing that forum. Others view the current threat as falling short of "armed attack" under Article 51 of the United Nations Charter, and therefore, the United States has no legal basis for the use of force in self-defense. Almost all agree on one point: if China decides to employ its nuclear weaponry, the answers to these issues will be rendered academic. Under the general principles of self-defense found in customary international law including the inherent right of self-defense acknowledged in Article 51 of the United Nations Charter, may the United States preemptively use force to protect itself against the Chinese nuclear threat absent Security Council authorization?

B. Thesis Statement

This article argues that the concepts of pre-emptive, anticipatory, and interceptive self-defense are part and parcel of the "inherent right of self-defense" recognized in Article 51 of the United Nations Charter. Though commonly described using those terms, these purported "theories" of self-defense are instead merely descriptions of lawful defensive actions taken at a time in which an armed attack has begun, but the defender state has not yet suffered any loss of life, property, or sovereignty at the hands of the attacker state. This article will show that it is both practically and legally erroneous to tie the definition of "armed attack" to such a loss of life, property or sovereignty at the hands

of an aggressor. Instead, the determination of whether a use of force is legally justified as pre-emptive self-defense should be assessed by whether the purportedly defensive or non-aggressor state possesses evidence beyond a reasonable doubt of the aggressor state's current intent and ability to utilize weapons of mass destruction or some other overwhelming force against the non-aggressor state. If so, the non-aggressor state has every right under customary international law and Article 51, United Nations Charter to respond with that amount of proportional force necessary to neutralize the threat with which it is faced. No tension exists between the "inherent right of self-defense" recognized in Article 51 of the United Nations Charter and the concept of "armed attack" required by that same article.

This paper will examine the facts surrounding historical examples of pre-emptive self-defense that indicate its acceptance as a norm of customary international law. While the scholarly commentary has covered the entire spectrum of possible views on the subject, in practice, states have consistently invoked theories of pre-emptive self-defense to justify military actions. Where evidence of state practice and expressions of scholarly commentary diverge, state practice provides the more relevant measure of custom and should trump scholarly commentary within the hierarchy of sources of customary international law.⁸ Measured by historical precedent, the use of force by states in pre-emptive self-defense has become an established norm of customary international law.

⁸ ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 50-51 (Cornell University Press 1971).

Despite the lawfulness of pre-emptive self-defense under customary international law and the United Nations Charter, this article does not advocate the abandonment of either measures short of force or multilateral solutions involving appropriate authorities within the United Nations in the resolution of international disputes. Instead, attempted employment of these potential solutions should remain the default position for dealing with threats to the peace and breaches of the peace. Nevertheless, a nation's fundamental right to self-defense does not accrue only after it has incurred some loss of life, property, or sovereignty at the hands of an aggressor.

II. Definitions and Terminology

Much of the debate regarding self-defense turns on how we define the various legal terms of art involved. As the title suggests, the author considers the terms "pre-emptive," "anticipatory," and "interceptive" self-defense, respectively, to be subsets of self-defense that occur at different temporal points on a continuum of unlawful aggression by another state. Therefore, while there are slight distinctions between these terms, the distinctions are largely a matter of degree rather than actual differences in substantive meaning. Regrettably, the proliferation of these terms has contributed to the confusion surrounding the debate on self-defense. Nevertheless, since many commentators on the subject have assigned different meanings to these terms, it is helpful to identify the purported distinctions among them and ask whether these distinctions are legally relevant to the definition of self-defense. This section will examine some of the definitions attached to these terms.

Before addressing these definitional issues, we will review the sources from which customary international law is derived. We will also examine how customary international law has addressed the concept of “armed attack.” This definition is of fundamental importance because the parameters of the right of self-defense under Article 51, United Nations Charter, can only be understood in light of the necessary condition precedent of an “armed attack.” Since the United Nations Charter does not offer a definition of “armed attack,” it is necessary to utilize formulations derived from customary international law.

Finally, this section will undertake a historical survey of self-defense measures occurring prior to loss of life, property or sovereignty by the defender.

A. Sources of Customary International Law

The two generally accepted sources of customary international law are “usage” or the practice of states and *opinio juris*, the subjective psychological feeling that a state is acting out of a legal right or obligation.⁹ One commentator has defined “usage” as the “material and detectable element” and *opinio juris* as the “immaterial and psychological element.”¹⁰

⁹ See generally *id.* at 47-72 (discussing the sources of customary international law).

¹⁰ *Id.* at 49 (citing Francois Geny, *Methodes d'interpretation et sources en droit prive positif* sec. 110 (1899)).

1. Usage or State Practice

“Usage” refers to repeated practices undertaken by sovereign states in their interaction with each other in the international community.¹¹ Usage may be measured in four ways: duration, repetition, continuity, and generality.¹² Duration refers to the amount of time over which a certain practice is done by a state or states.¹³ Repetition represents how often or densely the act is undertaken.¹⁴ Continuity denotes the unbroken consistency with which states engage in such acts.¹⁵ Generality refers to how broadly a certain action is undertaken throughout the international community.¹⁶ The greater the measure of these interrelated characteristics when applied to the specific practice of states, the more powerful the evidence that the practice has become customary international law.

2. *Opinio Juris*

Opinio juris has been defined in a variety of ways. One way of expressing the concept is as the psychological element whereby the usage amounts to the “exercise of a subjective right of those who practice it.”¹⁷ In other words, *opinio juris* represents the

¹¹ *Id.* at 56-66.

¹² *Id.* at 56.

¹³ *Id.* at 56-59.

¹⁴ *Id.* at 59.

¹⁵ *Id.* at 59-61.

¹⁶ *Id.* at 64.

¹⁷ *Id.* at 49 (citing Francois Geny, *Methodes d'interpretation et sources en droit prive positif* sec. 110 (1899)).

subjective feeling in the actor that the practice or usage they have engaged in is the expression of a right or duty on the part of the actor.¹⁸ *Opinio juris* may be indicated through the articulation of consent or protest by leaders, governments and commentators regarding the actions of states and the international legal norms applicable to them.¹⁹

B. Armed Attack

The essence of self-defense is self-help in response to an armed attack.²⁰ The Charter of the United Nations defines the parameters of the right to self-defense utilizing the phrase “if an armed attack occurs.”²¹ Therefore, how international law defines “armed attack” determines when the right of self-defense accrues, be it so-called “pre-emptively” or otherwise. For these reasons, “armed attack” is the cornerstone legal concept of the law of self-defense. This portion of the paper will examine how “armed attack” has been defined historically and propose a way of applying that historical view within the context of 21st century threats to international peace and security.

¹⁸ *Id.*

¹⁹ *Id.* at 73-78.

²⁰ YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, 175 (Cambridge University Press 1994).

²¹ U.N. CHARTER art. 51.

1. Historical Definition of “Armed Attack”

a. Text of Article 51

Article 51 of the Charter of the United Nations states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²² Unfortunately, neither the text of Article 51 nor that of any other provision of the Charter defines the phrase “armed attack” used in Article 51.²³ While there is little textual assistance in defining Article 51, some commentators have noted that “[t]here is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states.”²⁴

b. *Nicaragua v. U.S.*

The International Court of Justice addressed the issue of what actions by a nation constitute an “armed attack” in the Case Concerning the Military and

²² *Id.*

²³ *Id.*

²⁴ Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 A.J.I.L. 597, 599 (1963). Citing D.W. Bowett, *Self-Defence in International Law*, 188 (1958) (stating that the preparatory work [on the U.N. Charter] suggests “only that the article [51] should safeguard the right of self-defence, not restrict it.”) Professor McDougal further cautions against an interpretation of Article 51 which substitutes the meaning “if, and only if, an armed attack occurs” for the actual text of the article “if an armed attack occurs.” *Id.* at 600.

Paramilitary Activities in and Against Nicaragua.²⁵ In *Nicaragua v. United States*, the United States argued that its military activities directed against Nicaragua were lawful collective self-defense in response to Nicaragua's active support in the form of arms and training to rebel groups operating in neighboring countries, particularly in opposition to the government of El Salvador.²⁶ Nicaragua countered that the United States' claims were merely a pretext for its own military activities against the government of Nicaragua.²⁷ The International Court of Justice framed the issue by stating that if Nicaraguan support to the armed opposition in El Salvador constituted an armed attack on El Salvador, the United States could legally invoke the collective right of self-defense.²⁸ The Court then described actions that would be considered an "armed attack":

In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein".²⁹

The Court elaborated that "the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because

²⁵ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-4 (June 27).

²⁶ *Id.* at 70-72.

²⁷ *Id.* at 70-71.

²⁸ *Id.* at 71.

²⁹ *Id.* at 103. [Citing Article 3, para. (g), Definition of Aggression, General Assembly Resolution 3314 (XXIX)].

of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”³⁰ Applying these criteria, the Court held that it “does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.”³¹ The Court declined to rule on the issue of the lawfulness of a response to the imminent threat of armed attack because the parties did not raise that issue.³²

The Court’s decision in *Nicaragua v. United States* leaves the definition of “armed attack” in a confused state.³³ Unfortunately, it is the only precedent in international case law that specifically addresses the definition of “armed attack” under Article 51.

2. A Proposed Definition of “Armed Attack”

As the language of the United Nations Charter and the opinion of the International Court of Justice in *Nicaragua v. United States* indicate, defining when an “armed attack” occurs is an exercise in line drawing that takes on an almost metaphysical dimension. Does an armed attack occur only when a nation has suffered some measure of death to its citizens, destruction to its property, or incursion into its sovereign territory at the hands of

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 103.

³³ DINSTEN, *supra* note 20, at 102-3 (stating that “[w]hat emerges is a quadruple structure of (i) self-defence versus (ii) armed attack, and (iii) counter-measures analogous to but short of self-defence versus (iv) forcible measures short of an armed attack”)

another state? Must there be a tangible loss to the defender before response with force in self-defense is legally justified? Unfortunately, there is no clear legal authority on these specific issues.

The relevant legal issue is where on the temporal continuum of aggression does an “armed attack” begin thereby justifying the use of force in self-defense? There are many points on the timeline of aggression that might satisfy this question. An “attack” may be divided into several successive phases each with distinctly different characteristics from those that precede and succeed it. At what phase does the “attack” actually begin? Is it when ballistic munitions are on their way and irretrievable? When a commander has given the order to attack? When the armada leaves its homeport? When the invasion force enters another state’s sovereign waters? Is it as simplistic as which side fired the first shot?³⁴

These rhetorical questions are meant to illustrate the inherent difficulties in defining an “armed attack.” Professor Dinstein argues that “[t]he crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon.”³⁵ This expression of the issue fails because it is rarely, if ever, impossible to abort an armed attack prior to

³⁴ *Id.* at 187-191. Professor Dinstein uses the following hypothetical situations, among others, to identify the limitations of using the “first shot” approach to define when an armed attack begins and to further the proposition that an armed attack can occur prior to any shot being fired. The first example is that of a massed army from state A moving across a frontier border into state B; soldiers of state B fire first at the advancing invaders. Another example is where state B, in response to an intercontinental ballistic missile barrage headed toward it from state A on the other side of the planet, fires a missile from one of its submarines and hits a naval vessel from state A prior to state A’s missiles arriving on state B’s territory. A final example is where troops from state A are stationed on state B’s territory for a limited time by agreement. When the time comes to an end, the troops from state A fail to leave and those of state B open fire in order to force the evacuation of the troops from state A. According to Professor Dinstein, state B is exercising its right of self-defense despite having fired the first shot in each scenario. *Id.*

³⁵ *Id.* at 190.

incursion into the sovereign territory of the defender with troops or munitions. The armada may return to its homeport without firing a shot. A commander may rescind an order after some circumspection and before the kinetic effects of its intent have been achieved. In the most extreme example, some munitions may be steered away from their intended course well after they have departed toward the target. As Professors McDougal and Feliciano argue, “there may in fact be no last irrevocable act.”³⁶ Similarly, “[t]here is a whole continuum of degrees of imminence or remoteness in future time, from the most imminent to the most remote, which, in the expectations of the claimant of self-defense, may characterize an expected attack.”³⁷ Technological advances in weaponry that have increased their stealth as well as their devastating potential only exacerbate the difficulty of defining “armed attack” based purely upon temporal considerations.³⁸

On the other hand, defining the right of self-defense based solely upon the measurable kinetic effects of an attack on the defender allows for a large subset of preparatory and executing activities pursuant to an attack that, though they indicate an attack is underway or imminent, the defender possesses no legal theory with which to justify its immediate use of force in self-defense.

Ultimately, regardless of where the line is drawn on the continuum of possible actions by an aggressor, the choice appears arbitrary, devoid of any logical underpinning.

³⁶ MYRES S. MCDUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 240 (1961).

³⁷ *Id.* at 231.

³⁸ *Id.*

Arguably, the two temporal extremes on the continuum, (1) when the decision to attack is initially made and, (2) when the attack's kinetic effects are felt within the territory of the defender state, are the most logical points to draw the line because they seem to more starkly define a departure from peace to war. Put another way, they indicate a more fundamental change from the condition precedent than any of the other steps along the continuum. Nevertheless, limiting the choice to those two points rings of arbitrariness. Additionally, no matter which is chosen, the result is a rule that is as substantively different from the other equally logical conclusion as is possible. Such arbitrariness cannot be ignored and the paradigm that results in such a dilemma must be abandoned. Though relevant, defining "armed attack" based upon relative temporal positions on a continuum of aggression is not the best answer, nor even an answer to the best question.

Instead, the most relevant issue is formulated as follows: how compelling is the evidence at any given time that one nation has the military means to bring devastating force to bear upon another, intends to do so, and has taken a step toward that end? At first glance this test may appear less appealing because rather than a standard defined by a bright temporal line, the answer will depend very specifically upon the facts of each situation and the strength of the evidence possessed by the defender state. The high variability of factual scenarios may provide a rationale for restricting the use of force in self-defense to a point relatively later in time. This is not because there is any compelling logic which results in the choice of one moment over another, but rather because as time goes by there is almost universally a greater likelihood the defender state will possess more evidence of the aggressor state's intent and ability to attack. However, while this is

surely true in a macro sense, in any given case the moment where sufficient evidence indicates an imminent attack may be quite early in the aggressor's preparations for such an attack. The overall strength of the evidence of an aggressor's intent, ability, potential destructiveness and preparation to attack is a much more comprehensive test for defining when the right of self-defense has begun than simple temporal comparisons.

So, the relevant issues are how much does the defender know regarding evidence of these elements, and when does the defender know it. Returning to our original hypothetical, let us assume for the sake of argument that a defender state has perfect intelligence that another nation's leader has just given the order for nuclear annihilation of the defender state. Further assume that this evidence has been accurately verified, painstakingly documented, and is available for the community of nations to inspect. Is there any legal or moral principle that would proscribe the use of force by all means necessary in self-defense to completely neutralize the threat posed by the aggressor state without regard to how much time remains before the intended annihilation? No such principle exists.

Conceding that there will always be more potential evidence of an ongoing attack as the timeline advances, there is, nevertheless, the possibility that enough evidence might be known very early in the process. As long as the defending state possesses evidence beyond a reasonable doubt that an aggressor intends to attack with massive force, has the ability to do so, and has taken a step in that direction, the defender state is justified under the international law of self-defense to respond to completely neutralize the threat. To

conclude otherwise would be to force all defender states to forever surrender the element of surprise to the aggressor state, and particularly to those states that are most powerful and most able to conceal their destructive designs until a point at which meaningful self-defense is non-existent. Such a result would be illogical and unjust. As Professor Beres puts it, "International law is not a suicide pact."³⁹

C. Self-Defense

Unfortunately, the concept of self-defense has been unnecessarily complicated by the alleged creation, if only nominally, of different "types" of self-defense identified by various modifiers attached as prefixes. Because this proliferation of "theories" has occurred, we must account for the purported differences in the terms' meanings in an effort to ensure a mutual understanding of them.

The terms "pre-emptive," "anticipatory," and "interceptive" are all attempts to define self-defense actions occurring at various temporal points prior to the defender incurring any negative affects from an imminent or ongoing attack. In this section, we will examine some of the definitions of each "theory" of self-defense cited by various commentators in an order corresponding roughly to an increase in the temporal remoteness the self-defense measure seems to have in relation to the occurrence of an actual or expected armed attack resulting in loss of life, property, or sovereignty. However, we will address the concept of "pre-emptive" self-defense after the other formulations of self-defense have been discussed.

³⁹ Louis Beres, *A Rejoinder* 9 TEMP. INT'L & COMP. L.J. 445, 449 (1995).

Despite our examination of these various “types” of self-defense theories, it is the author’s contention that absent authorization to use force from the United Nations Security Council, all other uses of force fall into two possible categories: 1) those legally conducted based upon the inherent right of self-defense and 2) those which amount to an unlawful use of force under the United Nations Charter and customary international law. Recognizing that the right of self-defense in response to an attack that has already caused loss of life, property or sovereignty is not at issue, for the remainder of this paper the term “pre-emptive self-defense” will be used to identify self-defense measures occurring prior to any such loss incurred by the defender state. The term “self-defense” will be used to identify those actions in self-defense taken after negative affects have been visited upon the defender state.

1. The Inherent Right of Self-Defense

Article 51 of the United Nations Charter refers to the “inherent right of individual or collective self-defense.”⁴⁰ The “inherent right of self-defense,” though recognized by the Charter, is not further defined by the text of that article or by any other article within the Charter. Nor could it be if the term “inherent” were to possess any meaning substantially similar to its common definition. The inherent right of self-defense exists independently from the Charter and is defined by customary international law as evidenced by the practice of nations throughout history.⁴¹ The International Court of Justice in *Nicaragua v. United States* found “that Article 51 of the Charter is only meaningful on the basis that

⁴⁰ U.N. CHARTER, art. 51.

⁴¹ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94, 102 (27 June).

there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.”⁴²

2. Interceptive Self-Defense

Professor Dinstein defines “interceptive” self-defense as a use of force in self-defense that “takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way.”⁴³ He cites as an example of “interceptive” self-defense the hypothetical situation where, before the attack on Pearl Harbor, the United States’ Pacific Fleet was able to intercept the Japanese Carrier Striking Force and sink it prior to reaching its destination and before a single Japanese naval aircraft got anywhere near Hawaii.⁴⁴ Such an action seems to exemplify the classical, inherent right of self-defense discussed earlier. Though legally valid, the concept of “interceptive” self-defense adds little substance to the debate, but instead, contributes another term that tends to confuse the issue. Professor Dinstein seems to concede as much when he states, “It is the opinion of the present writer that interceptive, as distinct from anticipatory, self-defence is

⁴² *Id.* at 94. Explaining that

[T]he United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack.

⁴³ DINSTEIN, *supra* note 20, at 190.

⁴⁴ *Id.*

legitimate even under Article 51 of the Charter.”⁴⁵ The author arrives at the same conclusion but on the basis that the “armed attack” is well underway when the Japanese Carrier Striking Force has left Japan with orders to attack Pearl Harbor.

3. Anticipatory Self-Defense

Anticipatory self-defense has been defined as “the resort to force in order to prevent an expected aggression.”⁴⁶ Some commentators consider the test enunciated by Secretary of State Daniel Webster in the *Caroline* Case as defining the limits of anticipatory self-defense in customary international law.⁴⁷

In correspondence with British officials in 1841 and 1842, Secretary Webster outlined the legal and factual requirements for the lawful use of anticipatory self-defense pertaining to an incident where British military action resulted in the killing of two crewmembers and the destruction of the American steamer *Caroline* during the Canadian Rebellion of 1837.⁴⁸ In response to British claims that the action was justifiable under a theory of self-defense, Secretary Webster observed

⁴⁵ *Id.* (Citing M.N. SHAW, INTERNATIONAL LAW 695 (3rd ed., 1991)).

⁴⁶ MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW, sec. 22, 865 (1965).

⁴⁷ OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 150-152 (1991).

⁴⁸ Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325, 328-330 (1999). (See also The Avalon Project at Yale Law School at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> containing transcripts of the correspondence between United States Secretary of State Daniel Webster and Lord Ashburton of Great Britain and a detailed historical account of the incident resulting in the destruction of the *Caroline*.)

But the extent of this right of self-defense is a question to be judged of by the circumstances of each case; and when its alleged exercise has led to the commission of the hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification.⁴⁹

Webster further elaborated on the theory's criteria stating "It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁵⁰ This is the substance of Webster's legal standard for the lawful use of force in anticipatory self-defense.⁵¹

Though some commentators have sought to apply Webster's criteria to all uses of force in self-defense,⁵² Professor Kearley argues persuasively that Webster only intended for the *Caroline* criteria to apply to the use of force in anticipatory self-defense within the territory of another state.⁵³ Kearley identifies the *Caroline* Doctrine's narrow application stating "Seen in the proper context, it is obvious that Webster directed his highly restrictive conditions only to uses of force by one state within the territory of another state which had violated no international legal obligations to the first state that might

⁴⁹ *Id.* at 329 (citing THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104 (N.Y., Harper & Bros. 1848)).

⁵⁰ *Id.* (citing THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104 (N.Y., Harper & Bros. 1848)).

⁵¹ *Id.*

⁵² *Id.* at 330-331. (citing ENCYCLOPEDIA OF INTERNATIONAL LAW 361 (Clive Perry et al. eds., 1988); Martin A. Rogoff & Edward Collins, *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 498 (1990), among others holding this view.)

⁵³ *Id.* at 329-330.

have justified that first state's use of force."⁵⁴ He concludes "It is clear that Webster had no intention of creating any general rules for the use of force by a state in self-defense, or in particular for the use of force by a state within its own territory against armed attack."⁵⁵ This conclusion appears accurate in light of Webster's emphasis on the circumstances giving rise to the right of self-defense in the *Caroline* incident which he describes as "the commission of the hostile acts in the territory of a power at peace."⁵⁶ This seems intuitively obvious because if the use of force in self-defense occurs within the territory of the defender state then Webster's criteria are necessarily met; however such defensive measures are not accurately described as "anticipatory." Specifically, if foreign troops are already present in the sovereign territory of the defender state, the defender is not "anticipating" an attack, the attack has occurred. On the other hand, as was the case in the *Caroline* incident, if the self-defense measures are undertaken in the territory of another state currently at peace with the purported defender state, it follows that the criteria necessary to justify the anticipatory use of force under such circumstances should be highly restrictive.

In conclusion, it appears that not only did Secretary Webster intend for his criteria to apply only to anticipatory self-defense, but additionally, only to anticipatory self-defense where the defensive action occurs in the territory of a third state with which the defender is at peace. Though still of great relevance to the debate, the unique facts and intended

⁵⁴ *Id.*

⁵⁵ *Id.* at 330.

⁵⁶ *Id.* at 329.

narrow application of *Caroline* renders it inconclusive with respect to the general right of anticipatory or pre-emptive self-defense.

In a somewhat different formulation of anticipatory self-defense, Professor Dinstein defines the concept as a “preventive measure taken in “anticipation” of an armed attack, and not merely in response to an attack that has actually occurred.”⁵⁷ Though clear that anticipatory self-defense must occur prior to an actual attack, Professor Dinstein’s use of the term “preventive” in defining anticipatory self-defense suggests that he views “preventive” self-defense synonymously with “anticipatory” self-defense.⁵⁸

4. Preventive Self-Defense

Another formulation of self-defense that has been discussed is the so-called “preventive” self-defense. Senator Edward M. Kennedy recently attempted to distinguish concepts of “preventive” and “pre-emptive” self-defense for his colleagues in the United States Senate.⁵⁹ Senator Kennedy defined “pre-emptive” action as referring to “times when states react to an imminent threat of attack” and cited Israel’s attack on Egyptian and Syrian military units massing on Israel’s borders in 1967 as a justifiable use of pre-emptive self-defense.⁶⁰ In contrast, Kennedy defines “preventive” military action as

⁵⁷ DINSTEIN, *supra* note 20, at 182-183.

⁵⁸ DINSTEIN, *supra* note 20, at 190.

⁵⁹ Senator Edward M. Kennedy, Statement delivered on the floor of the United States Senate (October 7, 2002).

⁶⁰ *Id.*

“strikes that target a country before it has developed a capability that could someday become threatening,” for example Japan’s surprise attack on Pearl Harbor in 1941.⁶¹

The tenor of Senator Kennedy’s speech seems to intimate a philosophical rift between his view of the law of international self-defense and President Bush’s view as outlined in the National Security Strategy. However, from the author’s perspective the Senator’s distinction between “pre-emptive” and “preventive” self-defense seems clear and there appears to be no disagreement between the President’s understanding of pre-emptive self-defense and that of the Senator. Certainly, there is little, if any, support for a theory of self-defense built solely upon a theoretical threat which may materialize in the future, but of which there is no present evidence regarding intent, ability or destructive capability. Such a formulation of “preventive self-defense” ignores the very essence of self-defense, the requirement of some sort of current or imminent threat of armed attack.

Professor Dinstein defines “preventive” self-defense as that which “anticipates an armed attack that is merely “foreseeable” (or even just “conceivable”)”⁶² and distinguishes “interceptive” self-defense as that which “counters an armed attack which is “imminent” and practically “unavoidable.”⁶³ The use of the terms “foreseeable” and “conceivable” in his definition of “preventive” self-defense confuses the issue even further because of the substantial difference in meaning between the two words.

⁶¹ *Id.*

⁶² DINSTEIN, *supra* note 20, at 190.

⁶³ *Id.* (Citing C. C. Joyner and M. A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 V.J.I.L. 621, 659-60 (1984-5))

“Foreseeable” signifies some sort of concrete, objective evidence of a future attack while “conceivable” seems to denote something much more theoretical and subjective, albeit possible. The author disagrees with the notion that a justifiable claim of self-defense could ever be based merely upon a “conceivable” attack regardless of what we choose to call that theory of self-defense.

5. Pre-emptive Self-Defense

When read as a whole, President Bush’s National Security Strategy defines pre-emptive self-defense in a way that is applicable to the realities of the modern age of weapons of mass destruction.⁶⁴ Specifically, that document defines “pre-emptive” self-defense as the proactive use of force in response to an imminent threat to “forestall or prevent [such] hostile acts by our adversaries” even when we are unsure of the planned timing and location of those hostile acts.⁶⁵

When comparing the National Security Strategy’s formulation of pre-emptive self-defense with the other “types” of self-defense addressed above, it seems that interceptive self-defense and preventive self-defense comprise the logical extremes of the debate on the subject. The former differs little, if at all, from the most basic invocation of the inherent right of self-defense, while the later attempts to create a truly novel concept of self-defense by discarding any requirement of imminent attack.

⁶⁴ PRESIDENT BUSH, *supra* note 1, at ch. V.

⁶⁵ *Id.*

Therefore, of all the purported formulations of self-defense, Webster's definition of anticipatory self-defense is most comparable with the National Security Strategy's definition of pre-emptive self-defense. Setting aside for a moment Professor Kearley's persuasive argument that Daniel Webster's definition of anticipatory self-defense was intended to apply narrowly to the facts of the *Caroline* incident and not to self-defense in general,⁶⁶ Webster's criteria nevertheless appear compatible with the Bush administration's definition of pre-emptive self-defense.

One might object that a proactive defensive response such as envisioned under the National Security Strategy definition might be characterized as necessarily resulting from some measure of deliberation. However, if Webster's requirement of "necessity" means that the threat itself has materialized (and therefore is "instant, overwhelming, leaving no choice of means and no moment for deliberation"), but not necessarily the execution of that threat, then the meanings of the two definitions are extremely similar. This interpretation recognizes that Secretary Webster's definition does not require an actual armed attack, but instead requires the presence of actions imminently leading toward such an attack to justify pre-emptive self-defense. This point might be easily lost in the restrictive circumstances and wording of Webster's formulation, which seems to closely approach requiring an actual armed attack. On the other hand, if Webster's test were to require an actual armed attack, then the subject would not be pre-emptive self-defense at all. This interpretation of Webster's test for the justification of pre-emptive self-defense is compatible with the standards enunciated in the National Security Strategy.

⁶⁶ Kearley, *supra* note 48 at 344-46.

To the contrary, Professor Dinstein believes that Article 51 of the Charter excludes the pre-emptive use of force in self-defense.⁶⁷ However, he also recognizes the prevalent theory that Article 51 “highlights one form of self-defence” but doesn’t negate the possibility of other manifestations of that right under customary international law.⁶⁸

6. A Complex Matter of Semantics!

As the preceding discussion highlights, the conceptual distinctions purportedly represented through the use of these varied terms are generally too thin to warrant the use of different verbiage to describe what are essentially identical concepts of lawful self-defense. These “distinctions without a difference” have created much of the confusion in this area of international jurisprudence. Of course, as noted above, the one exception is the theory of “preventive” self-defense. The author strongly disagrees with the notion that a state could ever justifiably claim a right of “preventive” self-defense in response to an “attack” that is merely “conceivable.” This formulation appears to lower the standard to an unacceptably low level of proof thus lending credence to the possible objection that “preventive” self-defense is likely to be used as a pretext to “justify” otherwise unlawful aggression. Otherwise, the various descriptions of self-defense discussed above differ very little from each other in a substantive sense.

⁶⁷ DINSTEIN, *supra* note 20, at 184.

⁶⁸ *Id.* at 184-185. (citing D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-92 (1958); M.S. MCDUGAL AND F.P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); J. STONE, AGGRESSION AND WORLD ORDER 44 (1958) and Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J.14 (June 27) (dissenting opinion of Judge Schwebel).

What should be most apparent from the previous discussion of definitions is that the various terms used in this area of the law provide little help in understanding the legal concepts they supposedly represent. Instead, they tend to confuse the issues in the manner of "form over substance." The bottom line is that "pre-emptive," "anticipatory," and "interceptive" self-defense all merely refer to actions taken by a non-aggressor state to defend against actions by an aggressor state prior to any loss of life, property or sovereignty being incurred by the non-aggressor state at the hands of the aggressor state. It is unfortunate that such modifiers have been introduced to the debate as if they described something fundamentally different from self-defense itself. Instead, they accurately recognize the broad scope of self-defense that allows for self-defense measures prior to the actual occurrence of an imminent attack. Thus, "pre-emptive," "anticipatory," and "interceptive" self-defense are all temporal subsets of, and indistinguishable from, self-defense.

III. Historical Background of Use of Force in Self-Defense

A. Pre-UN Charter

1. Examples of Classical Self-Defense

The following is a historical survey of certain United States' authorizations for the use of force resulting from previous attacks carried out upon the United States and its citizens. It is not meant to be exhaustive but rather illustrative of classical self-defense actions.

a. Authorization for Use of Force in Response to French Seizures of United States' Commercial Shipping

In the late 18th century, the United States found its commercial shipping vessels the targets of French pirates and privateers.⁶⁹ Three hundred and sixteen American ships were seized between July 1796 and June 1797.⁷⁰ In response to these unlawful seizures of United States' citizens' property, the Congress of the United States authorized the use of force.⁷¹ In one of the earliest military actions in American history, the United States

⁶⁹ THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE, 86-93 (Prentice-Hall, Inc., 1974).

⁷⁰ *Id.*

⁷¹ Protection of the Commerce of the United States, Act of July 9, 1798, ch. 68, 1 Stat. 578. The text of the Act states

Navy captured more than eighty armed French ships during the next two and a half years.⁷² Similar authorizations for the use of force were enacted and executed in response to Tripolitan⁷³ and Algerian⁷⁴ seizures of American commercial shipping.

b. War of 1812

During the early 19th century, Great Britain also engaged in the practice of pirating American commercial shipping vessels, seizing nine hundred and seventeen between 1803 and 1812.⁷⁵ The crews of these captured vessels were often impressed into the service of the British navy where it is estimated 8,000 to 10,000 Americans served in “nautical slavery.”⁷⁶ Furthermore, British naval operations consistently violated United States’ sovereignty in her territorial waters and even led to the occasional killing of

Whereas armed vessels sailing under authority or pretence of authority from the Republic of France, have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation. Therefore: Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the President of the United States, and he is hereby authorized to instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to the citizens thereof;-and also to retake any ship or vessel, of any citizen or citizens of the United States which may have been captured by any such armed vessel. *Id.*

⁷² BAILEY, *supra* note 69, at 95.

⁷³ Protection of the Commerce and Seamen of the United States Against the Tripolitan Cruisers, Act of February 6, 1802, ch. 4, 2 Stat. 129.

⁷⁴ Protection of the Commerce and Seamen of the United States Against the Algerine Cruisers, Act of March 3, 1815, ch. 90, 3 Stat. 230.

⁷⁵ BAILEY, *supra* note 69, at 141-143.

⁷⁶ *Id.* at 118-20.

American citizens.⁷⁷ Finally, there were charges that the British were secretly allied with certain Native Americans tribes, paying them bounties for the scalps of United States' citizens.⁷⁸ For these reasons, on June 18, 1812, the Congress of the United States declared war on Great Britain, the first such declaration in the nation's history.⁷⁹

c. World War II

On December 7, 1941, a Japanese carrier strike force attacked Pearl Harbor, Hawaii, crippling the United States Navy's Pacific fleet and causing approximately three thousand casualties.⁸⁰ The next day, President Roosevelt requested, and the Congress approved, a war resolution recognizing the existence of a state of war with Japan.⁸¹

⁷⁷ *Id.* at 143. Referring to an incident where a British naval vessel fired upon an American frigate, the *Chesapeake*, killing three men and wounding eighteen. *Id.* at 123.

⁷⁸ *Id.* at 135-36.

⁷⁹ War with Great Britain 1812, Act of Jun. 18, 1812, ch. 102, 2 Stat. 755. The declaration states

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof. *Id.*

⁸⁰ BAILEY, *supra* note 69, at 737.

⁸¹ War with Japan 1941, Act of Dec. 8, 1941, ch. 561, 55 Stat. 795. The Joint Resolution states

Declaring that a state of war exists between the Imperial Government of Japan and the Government and the people of the United States and making provisions to prosecute the same. Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a state of war between the United States and the

On December 11, 1941, Japan's Axis allies, Germany and Italy, declared war on the United States.⁸² In response, the United States Congress approved identical resolutions declaring that a state of war existed with Germany⁸³ and Italy.⁸⁴ The following year the United States Congress approved similar resolutions against Bulgaria,⁸⁵ Hungary,⁸⁶ and Rumania⁸⁷ after they had declared war against the United States.

2. An Example of Anticipatory or Pre-emptive Self-Defense: The *Caroline* Case

Often cited as an example of anticipatory or pre-emptive self-defense, the *Caroline* Incident occurred along the U.S.-Canadian border during the 1837 Canadian Rebellion against the British.⁸⁸ Despite attempts by the U.S. government to prevent its citizens from participating in the conflict, many Americans aided the Canadian rebels.⁸⁹ The American steamer *Caroline* was used by the rebels to deliver men and supplies from New York to Navy Island, a piece of Canadian territory which had been seized by the rebels

Imperial Government of Japan which has thus been thrust upon the United States is formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States. *Id.*

⁸² BAILEY, *supra* note 69, at 741.

⁸³ War with Germany 1941, Act of Dec. 11, 1941, ch. 564, 55 Stat. 796.

⁸⁴ War with Italy 1941, Act of Dec. 11, 1941, ch. 565, 55 Stat. 797.

⁸⁵ War with Bulgaria 1942, Act of Jun. 5, 1942, ch. 323, 56 Stat. 307.

⁸⁶ War with Hungary 1942, Act of Jun. 5, 1942, ch. 324, 56 Stat. 307.

⁸⁷ War with Rumania 1942, Act of Jun. 5, 1942, ch. 325, 56 Stat. 307.

⁸⁸ Kearley, *supra* note 48 at 328.

⁸⁹ *Id.*

for use as a base of operations against mainland Canada.⁹⁰ The last of such trips was made on December 29, 1837 after which the *Caroline* returned to Fort Schlosser in New York.⁹¹ The British commander, Colonel McNab, decided to attack the *Caroline* while it was in American territorial waters.⁹² That night the British boarded the *Caroline*, killed two of her crew, set the vessel afire, and sent her over Niagara Falls.⁹³

Though the Americans immediately protested this action by the British military, the issue wasn't addressed until 1840 when Alexander McLeod, a British subject, was arrested and charged with murder and arson for his participation in the attack.⁹⁴ In a series of letters from the American Secretary of State, Daniel Webster, to the two representatives of the British government, Mr. Fox and Lord Ashburton, Secretary Webster set out the elements of anticipatory self-defense to be applied under circumstances such as those surrounding the *Caroline*.⁹⁵ Secretary Webster formulated the criteria for a justifiable use of force in anticipatory self-defense under the circumstances as a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁹⁶

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 328-9.

⁹⁶ *Id.* at 329. [citing to THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 110 (N.Y., Harper & Bros. 1848)].

B. Post-United Nations Charter

1. The United Nations Charter Addresses Self-Defense

The United Nations Charter endeavors to outlaw the use of force in relations between states except in self-defense or where the Security Council makes a specific determination that there is a breach of the peace requiring the use of force in response.⁹⁷ The following Articles within that document are particularly relevant to the discussion of self-defense under the United Nations Charter.

a. Article 2(4)

The text of Article 2(4) was the vehicle utilized to broadly outlaw force between the Member states and any other state. It has been construed as a broad prohibition on the unilateral use of force subject only to the self-defense exception outlined in Article 51 and addressed below.⁹⁸ The text of Article 2(4) states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.⁹⁹

⁹⁷ See U.N. CHARTER, arts. 2(4), 39, 42 and 51.

⁹⁸ Thomas Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 A.J.I.L. 839, 839-40 (2001).

⁹⁹ U.N. CHARTER, art. 2(4).

b. Article 51

Article 51 provides for a permissible unilateral use of force by an individual Member state under the U.N. Charter. This exception to the general prohibition on the use of force is based upon the inherent right of individual or collective self-defense. The text of Article 51 reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.¹⁰⁰

2. Post-United Nations Charter Example of Inherent Right of Self-Defense -
Afghanistan (2001)

On September 11, 2001 the United States was attacked by hijackers who crashed commercial passenger jets into the World Trade Center buildings and the Pentagon, causing approximately three thousand deaths.¹⁰¹ One week later, the United States Congress authorized the President to use all necessary and appropriate military force against those who perpetrated the attacks, referring to the United States' rights of self-

¹⁰⁰ U.N. CHARTER, art. 51.

¹⁰¹ Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 41 (2002) (citing Michael Grunwald, *Terrorists Hijack 4 Airlines, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1.)

defense.¹⁰² Importantly, the authorization does not mention nor seek any independent authorization from the United Nations for the use of force.¹⁰³ Less than a month later, President George W. Bush ordered the United States military to attack terrorist training camps and military installations in Afghanistan after it was discovered that members of Al Qaeda, a terrorist organization based there, had carried out the attacks and had been harbored and aided in doing so by the government of Afghanistan, the Taliban.¹⁰⁴

¹⁰² Authorization of the Use of Armed Force Against Those Responsible for the Recent Attacks Launched Against the United States, P.L. 107-40, 115 Stat. 224, September 18, 2001[S.J.Res. 23]. The authorization states, in relevant part

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens, and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights of self-defense and to protect United States citizens both at home and abroad, and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave threats of violence, and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, Whereas the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States. Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled. SECTION 1. SHORT TITLE This joint resolution may be cited as the "Authorization for Use of Military Force." SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES (a) That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. *Id.*

¹⁰³ *Id.*

¹⁰⁴ Murphy, *supra* note 101, at 41-42.

3. Post-United Nations Charter Examples of Pre-emptive Self-Defense

a. Cuban Missile Crisis (1962)

On Tuesday morning, October 16, 1962, President Kennedy learned that U-2 surveillance flights over Cuba had photographed the ongoing installation by Russian military personnel of surface-to-surface nuclear ballistic missiles on Cuban soil.¹⁰⁵ This information was discovered soon after President Kennedy had made it clear in a prepared statement on September 4, 1962 that the United States would not allow the Russians to place any type of offensive weapons in Cuba.¹⁰⁶ The Soviets quickly responded that they had no intention of placing nuclear weapons outside of the Soviet Union for there was no reason to do so.¹⁰⁷ The Soviet Foreign Minister Andrei Gromyko reiterated this position in a meeting with President Kennedy on Wednesday, October 17th.¹⁰⁸ Clearly, the Soviets were not truthful regarding their actions in Cuba. Once operational, the thousand-mile range of the missiles would put the lives of an estimated eighty million Americans in jeopardy.¹⁰⁹

¹⁰⁵ ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS, 23-24 (1969).

¹⁰⁶ *Id.* at 26-27.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 39-41. Foreign Minister Gromyko assured President Kennedy the Soviets were placing only “defensive” armaments in Cuba and training the Cubans on their use. *Id.*

¹⁰⁹ *Id.* at 35-36.

Almost immediately, the President decided he had to respond in some way; the Soviet actions could not be allowed to stand.¹¹⁰ On October 22, 1962, President Kennedy announced to the nation that the United States had decided to employ the United States Navy to impose a quarantine of Cuba.¹¹¹ When the first Soviet vessels reached the naval blockade, their commanders ordered them to turn around.¹¹² Shortly thereafter, the Soviet Union agreed to remove the remaining missiles from Cuba in exchange for a withdrawal of the naval blockade and assurances from the United States that we would not invade Cuba.¹¹³

How does the Cuban Missile Crisis square with the international law of self-defense? Though the unique facts of the crisis do not fit neatly into the self-defense paradigm, ultimately, President Kennedy decided upon a use of force in response to what he reasonably viewed as a grave and imminent threat against the United States. This step was taken despite the fact that the missiles had not been launched nor were they even operational at the time President Kennedy responded.

¹¹⁰ *Id.* at 33.

¹¹¹ *Id.* at 55.

¹¹² *Id.* at 71.

¹¹³ *Id.* at 89, 103. A letter from Soviet Chairman Nikita S. Khrushchev proposed the resolution of the crisis in relevant part with these words: "No more weapons to Cuba and those within Cuba withdrawn or destroyed, and you reciprocate by withdrawing your blockade and also agree not to invade Cuba." *Id.* President Kennedy accepted the offer in a return letter with these words in relevant part:

1. You would agree to remove these weapons systems from Cuba under appropriate United Nations observation and supervision; and undertake, with suitable safeguards, to halt the further introduction of such weapons systems into Cuba. 2. We, on our part, would agree – upon the establishment of adequate arrangements through the United Nations to ensure the carrying out and continuation of these commitments – (a) to remove promptly the quarantine measures now in effect, and (b) to give assurances against an invasion of Cuba. *Id.*

Clearly, the terms in which the debate was couched indicate a philosophical predilection towards a theory of pre-emptive use of force in self-defense, though at the time the measures were not described using this terminology. This conclusion is further indicated because the vast majority of options discussed to solve the crisis included the use of force in varying degrees: surgical air strikes,¹¹⁴ more comprehensive aerial bombing,¹¹⁵ naval blockade,¹¹⁶ and invasion of Cuba.¹¹⁷ While the option of no action was also discussed,¹¹⁸ so was the use of nuclear weapons against Cuba.¹¹⁹

Of even more significance, not one member of President Kennedy's Executive Committee¹²⁰ voiced any concern that the use of force in this situation was in any way illegal under the international law of self-defense. Though the pros and cons of each course of action were bandied about exhaustively, and Robert Kennedy recalled that the members of the committee were particularly vexed about the moral question of a large

¹¹⁴ *Id.* at 34.

¹¹⁵ *Id.* at 37.

¹¹⁶ *Id.* at 60-61.

¹¹⁷ *Id.* at 55.

¹¹⁸ *Id.* at 31.

¹¹⁹ *Id.* at 48.

¹²⁰ *Id.* at 30. (Short for the Executive Committee of the National Security Council and also referred to as Ex Comm, it was comprised of the following individuals: Secretary of State Dean Rusk; Secretary of Defense Robert McNamara; Director of the Central Intelligence Agency John McCone; Secretary of the Treasury Douglas Dillon; President Kennedy's advisor on national security affairs McGeorge Bundy; Presidential Counsel Ted Sorensen; Under Secretary of State George Ball; Deputy Under Secretary of State U. Alexis Johnson; General Maxwell Taylor, Chairman of the Joint Chiefs of Staff; Edward Martin, Assistant Secretary of State for Latin America; originally, Chip Bohlen, who, after the first day, left to become Ambassador to France and was succeeded by Llewellyn Thompson as the advisor on Russian affairs; Roswell Gilpatric, Deputy Secretary of State; Paul Nitze, Assistant Secretary of Defense; Vice-President Lyndon B. Johnson; Adlai Stevenson, Ambassador to the United Nations; Ken O'Donnell, Special Assistant to the President; and Don Wilson, Deputy Director of the United States Information Agency.

country attacking a small country like Cuba,¹²¹ no one expressed a reservation based upon the legality of the proposed action. Instead, military and political considerations dominated the debate.¹²² Though they chose not to assert a formal legal claim of self-defense for other reasons,¹²³ it seems as though the substance of the discussion was based upon a mutual but unstated belief among the members of the committee that the principles of pre-emptive self-defense were legally valid.

Part of the explanation for the proactive views of the members of the Executive Committee was likely the great destructive nature of the potential threat. Another probable factor was the apparent Soviet intent to use the missiles against the United States. This conclusion could be reasonably inferred from the act of secretly placing missiles in a closely neighboring country knowing that the United States would be compelled to remove them either by diplomacy or military force immediately upon discovering their existence. Could it have been an impetuous miscalculation by the Soviet Union? This is one possible explanation of the Soviets' actions. But given the historical context of the Cold War, it was not unreasonable for the military and political leadership of the United States to conclude that the Soviet Union was planning a surprise nuclear strike against the United States. Given the facts known at the time, a surprise nuclear attack was at least as plausible a conclusion as one of nuclear blackmail. Finally,

¹²¹ *Id.* at 37-39.

¹²² *Id.*

¹²³ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 134 (1986) Explaining that "the U.S. sought to avoid a reciprocal claim that U.S. missile bases near the Soviet Union were unlawful and justified Soviet armed response." *Id.* Instead, the U.S. officially relied on an authorization from the Organization of American States to justify the blockade. *Id.*

given the intelligence reports, there were no doubts that the Soviet Union had the weaponry to successfully conduct this type of attack.

As a result of all of these considerations, President Kennedy decided to employ a naval blockade to stop ships from the Soviet Union from entering Cuban waters.¹²⁴ The wording of the Proclamation is also indicative of the conceptual approach utilized by U.S. leaders during the crisis. It cites to the Soviet military build-up in Cuba including the “establishment by the Sino-Soviet powers of an offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America”¹²⁵ as the catalyst for a Joint Congressional Resolution.¹²⁶ It further cites to a recommendation by the Organ of Consultation of the American Republics¹²⁷ to “prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.”¹²⁸ To counter the military build-up, President Kennedy ordered the United States military “to interdict, subject to the instructions herein contained, the delivery of

¹²⁴ *Id.* at 140- 143. (Containing full text of the United States Proclamation dated October 23, 1962).

¹²⁵ *Id.* at 140.

¹²⁶ *Id.*

¹²⁷ *Id.* at 144-147.

¹²⁸ *Id.* at 140.

offensive weapons and associated material to Cuba.”¹²⁹ The President provided for an escalated use of force under certain conditions.¹³⁰

In conclusion, President Kennedy determined that the Soviets possessed and were assembling weapons of mass destruction in Cuba, and they intended to use them against the United States. He did not request the United Nations Security Council make a determination that a threat to the peace or a breach of the peace had occurred, as it was not necessary to do so when invoking the right of inherent self-defense consistent with Article 51. Instead, he unilaterally ordered the use of force in the form of a naval blockade, with contingency plans calling for more use of force if necessary. The naval blockade employed by the United States during the Cuban Missile Crisis is a prime example of the pre-emptive use of force in self-defense. It is significant that the naval blockade was conducted on the high seas where the naval vessels of the Soviet Union were guaranteed free passage under the law of the sea. Nevertheless, where their activities amounted to an imminent attack against the United States, President Kennedy exercised pre-emptive self-defense to counter the threat.

¹²⁹ *Id.* at 141.

¹³⁰ *Id.* at 142. The Proclamation stated, in relevant part,

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary. *Id.*

b. Israeli Raid on Iraqi Nuclear Reactor at Osiraq

In the first-ever attack on a nuclear site in the history of armed conflict, the Israeli Air Force destroyed the Iraqi nuclear reactor at Osiraq on June 7, 1981.¹³¹ The next day, Israeli Prime Minister, Menachem Begin justified the action by citing the Iraqi intent to use the facility to manufacture nuclear bombs with which to attack Israel.¹³² Uri Shoham provides voluminous detailed evidence of Iraq's intent to destroy the state of Israel in his 1985 article describing the circumstances of the attack¹³³ and the nuclear capabilities that the completion of the Osiraq reactor would provide to further that end.¹³⁴ Since the reactor was scheduled to become fully operational during the July to September 1981 timeframe, there was little time for deliberation.¹³⁵

Afterwards, Israel's actions were the subject of worldwide criticism.¹³⁶ The United Nations Security Council issued a resolution strongly condemning the attack.¹³⁷

¹³¹ Uri Shoham, *The Grenada Intervention: The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 191, 223 (1985).

¹³² *Id.*

¹³³ *Id.* at 204-207.

¹³⁴ *Id.* at 207-210.

¹³⁵ *Id.* at 221.

¹³⁶ *Id.* at 191-92.

¹³⁷ S.C. Res. 478, 36 U.N. SCOR (2288th mtg.) (1981), U.N. Doc. S/Res/487 (1981). But see also Anthony D'Amato, *Open Forum: Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259, 262 (1996) (Arguing that despite the United Nation Security Council Resolution's strong condemnation of Israel's attack, the fact the resolution did not mention punishment, reparations or damages, nor did it set in motion any enforcement machinery, thus indicating covert support for the operation by the international community.)

Similarly, much of the scholarly opinion concluded that the strikes were in violation of international law,¹³⁸ though the action had many defenders as well.¹³⁹

With the benefit of further factual verification and the more complete historical lens of hindsight, these air strikes appear to be justifiable pre-emptive self-defense conducted by an Israeli state faced with unequivocal threats to its existence from a nation with nuclear ambitions. Though the standard for action is only the objective evidence the purported defender possesses at the time the self-defense measures are taken, nevertheless, the bellicose history of the Iraqi regime over the ensuing twenty-two years continues to buttress what was an already solid Israeli self-defense claim in 1981. Even more dramatically, it is a necessary corollary under a theory of pre-emptive self-defense that any state that consistently advocates the destruction of another state over time and is in the process of acquiring weapons of mass destruction provides the other state with prima facie evidence of the necessary elements to invoke the defense. The facts precipitating Israel's destruction of the Osiraq nuclear reactor powerfully argue that, if anything, the nuclear age and the advent of other weapons of mass destruction have strengthened the rationales for pre-emptive self-defense. The inability to invoke such a theory under those circumstances has been characterized as suicidal.¹⁴⁰

¹³⁸ See generally John Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply* 9 TEMP. INT'L & COMP. L.J. 441 (1995) and John Quigley, *Open Forum: A Weak Defense of Anticipatory Self-Defense* 10 TEMP. INT'L & COMP. L.J. 255 (1996). (citing various sources of criticism of the air strikes)

¹³⁹ See generally Louis Beres, *A Rejoinder*, 9 TEMP. INT'L & COMP. L.J. 445 (1995) and Anthony D'Amato, *Open Forum: Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259 (1996). (citing various sources of support for the air strikes)

¹⁴⁰ Beres, *supra* note 139, at 445.

IV. A Proposed Formulation of Self-Defense Theory

This section will first address the divergence between the practice of states invoking theories of pre-emptive self-defense and the varied views of pre-emptive self-defense within the scholarly literature. Next, this section will propose another view of how pre-emptive self-defense fits into the international law of self-defense as a coherent subset of that inherent right.

A. Divergence between State Practice and *Opinio Juris*

As we have seen, history provides several clear examples of states invoking concepts of self-defense to justify pre-emptive self-help measures in response to imminent attack by other states. In fact, theories of self-defense in general are the most commonly claimed legal justifications for the use of force in the world today.¹⁴¹ Though there is no unambiguous consensus among the community of nations regarding claims of self-defense prior to an actual attack, the right of anticipatory self-defense enunciated in the *Caroline* case is invoked often enough to indicate that its standard is part of customary international law. As Professor Schachter states, “Webster’s statement in the *Caroline* case is probably the only acceptable formulation at the present time to meet this situation,” referring to circumstances where a target state is threatened with a massive and immediate attack.¹⁴²

¹⁴¹ Schachter, *supra* note 123, at 131.

¹⁴² *Id.* at 135-36.

Scholarly opinion and other indications of *opinio juris* on the subject of preemptive self-defense are varied and uncertain. There are a fair number of commentators who embrace its fundamental precepts and others who dismiss it as contrary to the United Nations Charter.

On balance, it seems that when we measure custom, the practice of states should be viewed as a more accurate barometer of the existence of custom than evidence of *opinio juris*. The practice of states is more indicative of custom because it is a very objective measure whereas it is very difficult, if not impossible, to determine national leaders' subjective views on the state of the law.¹⁴³ As Professor D'Amato eloquently argues,

For a state may say many things; it speaks with many voices, some reflecting divisions within top governmental circles, some expressing popular opinion via mass media, and some being "trial balloons" or other argumentative tactics. But a state can act in only one way at one time, and its unique actions, recorded in history, speak eloquently and decisively.¹⁴⁴

A more fundamental criticism of the concept of *opinio juris* is that it is "logically contradictory and hence impossible to prove."¹⁴⁵ Professor D'Amato summarizes this criticism with a question: "if custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law?"¹⁴⁶ This question seems to argue that if *opinio juris* is simply an

¹⁴³ D'Amato *supra* note 8, at 50-51.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 52.

¹⁴⁶ *Id.* at 53.

expression of a pre-existing right or obligation, then that pre-existing right or obligation is the real essence of custom thus rendering *opinio juris* redundant and immaterial to the creation of custom. For these reasons, it seems that state practice is significantly more relevant than *opinio juris* in both the creation of, and as evidence of, customary international law.

B. Proposed Elements of “Pre-emptive” Self-Defense

The following proposed elements could serve as a comprehensive framework for analyzing the facts underlying a claim that actions in pre-emptive self-defense were necessary to counter an imminent attack. For self-defense to be an authorized course of action, all of the following elements must be present simultaneously.

Of equal importance, and in the interest of severely limiting the factual scenarios whereby the use of force in pre-emptive self-defense is authorized, each and every element must be present beyond a reasonable doubt. Such a high level of proof is imperative when deciding issues as grave as whether one nation has the right to use force against another. While the risk of inaction in the face of an imminent armed attack is great, the law must also be ever mindful of the risk of erroneously using force to counter a supposed attack.

1. Aggressor's Intent to Attack

Though difficult to ascertain the mental state of a nation's leadership, evidence of intent might be reasonably inferred from certain types of circumstantial evidence. Some potential sources of circumstantial evidence from which intent might be proven are described below.

a. Threats Directed Toward Another State

Threats generally take the form of bellicose statements by the leadership of one state calculated to affect the behavior of another state in a way favorable to the interests of the aggressor state. The most extreme type of threat is one where the aggressor indicates its intent to destroy another state.¹⁴⁷ This type of threat clearly satisfies this element, though a threat need not be of this magnitude to do so. Such statements may be written or oral and either publicly or privately communicated to their intended target. Obviously, to the extent statements of this type are documented for future examination via videotaping, audiotaping or on paper, they are strengthened as a piece of evidence. Though threatening statements may actually be only blustering or idle threats, nevertheless, states to whom they are addressed may consider them objective indications of the intent of the threatening leader, absent evidence to the contrary.

¹⁴⁷ See Beres, *supra* note 139, at 449 (citing LIEBLER, *THE CASE FOR ISRAEL* 15 (The Globe Press, 1972) listing the following examples, among others, of public threats of destruction directed towards Israel: (1) In May 1967, Syria's Defense Minister, Hafez Assad stated "Our forces are now entirely ready . . . to initiate the act of liberation itself, and to explode the Zionist presence in the Arab homeland The time has come to enter into a battle of annihilation." (2) In May 1967, President Abdur Rahman Aref of Iraq declared "The existence of Israel is an error which must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear - to wipe Israel off the map."

An incidental benefit of the application of this element is a likely reduction in the use of coercive tactics in the form of threatening statements by one nation against another. The aggressor state will always have notice that such threats will help justify the lawful resort to force in self-defense even where such statements have not yet been fully acted upon by the aggressor state. On the other hand, this element may also result in a reduction of threats and a corresponding increase in the number of surprise attacks not preceded by threats. On balance, the potential negative effects of an element of intent are strongly outweighed by both the expected decrease in coercive threats generally and the ability, in the absence of overt threats, to discover equally reliable circumstantial evidence of aggressive intent from other intelligence sources.

One might question how the possibility of conditional threats would factor into the application of this element. In answering this question, we should distinguish between two types of conditional threats, what might be termed "active" and "passive" conditional threats. The distinction is based upon whether the condition precedent to the threatening state acting upon the threat abrogates any right of the state threatened.

For example, many treaties have historically included language which in substance threatens the use of force by state A against state B in the event state B attacks state C without legal justification.¹⁴⁸ This type of conditional mutual defense treaty would not be

¹⁴⁸ See The Inter-American Treaty of Reciprocal Assistance, Sep. 2, 1947, art. 3, para. 1. Stating, in relevant part,

The High Contracting Parties agree that an armed attack by an State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the

considered a threat or evidence of the intent of state A to employ aggression against state B because the condition precedent to such use of force is that state B unlawfully attack state C, an act outside of its rights under international law. Compare that scenario with a conditional threat in which state A threatens the use of force against state B if state B continues to conduct full and open trade with state C, an economic relationship which is lawful under all applicable international law. This position is a coercive threat which attempts to abrogate the right of state B to trade with state C, and though conditional, still would be objective evidence of state A's intent to utilize unlawful aggression against state B. Similarly, a conditional threat where state A attempts to force state B into taking some action would also constitute evidence of state A's intent to employ illegal force against state B. In conclusion, any conditional threat where one state attempts to force another state to take a certain action or to forbear on a contemplated action, either of which is within the second state's internationally recognized rights, would be considered evidence of the intent of the threatening state to use unlawful aggression.

b. Internal Statements Relevant to Intent

An even more conclusive category of evidence is that which is intercepted surreptitiously in the form of internal statements or documents indicating intent to use force against another state. There are various potential forms of this type of evidence including written documents and transcripts of telephonic, e-mail, or face-to-face

exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations. *Id.*

communications.¹⁴⁹ The surreptitious way in which this category of evidence would normally be collected lends veracity to the statements contained therein. Generally, there would be no motive to mislead or bluster with statements meant only for internal consumption. As such, these types of internal communications are likely the most compelling forms of evidence of a state's intent to commit acts of aggression against another state.

c. Other Potential Evidence

The classical examples of circumstantial but objectively measurable evidence of intent to attack include troop buildups, massing of troops on the border, and increased weapons manufacturing or procurement. Though these actions are potential evidence of a state's intent to commit acts of aggression against its neighbors, none of these acts are conclusive per se regarding the intent to attack. Nevertheless, evidence of such actions would tend to buttress other evidence of intent.

d. Temporal Limitations on the Intent to Attack

As with any legal standard, it is impossible to develop a rule that anticipates every potential factual scenario. With respect to intent, it might be asked whether such evidence may ever become stale such that it would not satisfy the element because too much time has passed between the defender's discovery of evidence of an aggressor's

¹⁴⁹ See Secretary of State Colin Powell, Address to the United Nations (Feb. 5, 2003) (presenting evidence of Iraqi intent to breach United Nations Security Council Resolution 1441).

intent and the moment at which the defender desires to respond with force. For example, the leader of state A threatens state B with annihilation. Twenty years later, state A embarks upon a nuclear weapons program. Is the element of intent described above met under these conditions? If these are the only facts available, it seems the intent element would not be met due to the temporal remoteness of the original threat. Of course, it is highly unlikely these bare facts would ever comprise all available facts upon which to make the decision. Realistically, the answer would depend upon the context of the relationship during the interim twenty-year period. Was the relationship generally amicable or bellicose during the intervening years? Are there other more recent indications of intent to attack or intent to coexist peacefully? Is the leader who made the original threat still in power? Without additional evidence, the original threat would likely be stale and the element of intent would not be satisfied.

2. Aggressor State's Imminent Ability to Attack

This element would be satisfied beyond a reasonable doubt by objective evidence of the purported aggressor state's means to attack the state wishing to invoke pre-emptive self-defense. Such proof necessarily includes the types of weaponry available to both potential adversaries and the proximity of the alleged aggressor state to the defender state. These two variables are inextricably intertwined within this element because the strength of the evidence of one may dictate the relative strength of the evidence of the other necessary to satisfy this element of proof.

One might ask how proximity of one state to another might be considered variable. Proximity cannot be viewed as a function simply of where national borders are located in relation to one another, but rather, must be measured in terms of where the purported aggressor state's offensive military assets are located in relation to potential targets of the defender state. This principle was demonstrated during the Cuban Missile Crisis when the Soviet Union enhanced its offensive proximity to the United States by stationing intercontinental ballistic missiles with nuclear warheads in Cuba with the capability of reaching much of the territory of the United States.¹⁵⁰ Prior to this move, the Soviet Union had a limited ability to attack the United States using its nuclear arsenal.¹⁵¹ Once accomplished, the new location of the missiles gave the Soviets the present ability to attack the United States with nuclear weapons.

The use of the term "imminent" is of great significance to an understanding of this element. The author is aware that in many circumstances the only reason why one state does not attack another is its lack of adequate weaponry to accomplish the task. Sometimes, based upon evidence of intent, once the requisite tools are in place, the attack will take place. Therefore, this element recognizes that fact by allowing the use of pre-emptive self-defense where the aggressor state is on the verge of developing the technology or making existing technology operational. The defender state need not wait until the technology has been procured, the personnel have been trained, and the weapon has been loaded, before acting in self-defense, assuming all other elements have been satisfied. Of course, the further a state moves along the path toward possessing a fully

¹⁵⁰ KENNEDY, *supra* note 105, at 35-36.

¹⁵¹ *Id.*

operational weapon of this nature, the evidence of its ability to employ it grows stronger. Evidence that a weapon is “on the drawing board” would not be sufficient to satisfy this element because the imminent nature of the threat is too attenuated. It is possible the plans will be abandoned or the attempts to manufacture the weapon will prove futile. However, any substantial movement along the path from the “drawing board” towards actual acquisition of the weaponry could elevate the ability of the aggressor state to attack to a point where it could properly be characterized as “imminent.” Assuming fulfillment of the other elements, a defender need not wait until the weapon system is fully operational to consider the aggressor’s ability to attack imminent.

3. High Potential Destruction Caused by an Attack

This element highlights the factual scenario which most exemplifies why a theory of pre-emptive self-defense is necessary in the 21st century. At the same time it limits the authority to act pre-emptively in self-defense to only those situations in which a state finds itself faced with the prospect of immense death and destruction at the hands of an aggressor. Requiring such a high threshold for the level of threat makes sense intuitively because only those attacks with the potential to cause a very high level of destruction are attacks where the defender state is denied a meaningful response in self-defense once the attack has been perpetrated. Border skirmishes, “pot-shots” across fence-lines, and incursions by small units into another nation’s territory generally do not present the potential for catastrophic devastation that the use of nuclear, biological and chemical weapons offers. Attacks with weapons of mass destruction, even in relatively small

numbers, can create unimaginable devastation and death to thousands of people. Even where a nation can mount a robust post-attack response, as the saying goes, “the damage is already done.”

However, it is important we not limit the doctrine of pre-emption only to self-defense in response to nuclear, biological or chemical attacks. Clearly, there are other forms of offensive operations that are capable of causing equally enormous devastation to the defender state. Anticipated imminent attacks comprised of massive aerial bombardment, the invasion of large armies across a state’s borders, and immense amphibious landings on a nation’s coastline would all clearly satisfy the requirement for potentially massive destruction. Regardless of the type of threat, the greater the potential destruction, the more likely this element of the test for the use of force in pre-emptive self-defense will be satisfied.

4. Any Act towards Perpetration of an Attack

This element provides another objective factual test guaranteeing that the state wishing to invoke pre-emptive self-defense is actually facing an imminent attack by an aggressor. It constitutes an additional piece of concrete evidence that leads the reasonable observer to conclude that such an attack is truly imminent. This element is distinguishable from the other elements because it must be the last one satisfied. This requirement makes sense intuitively because the act must be part of a certain type of attack that justifies pre-emptive self-defense, specifically, an attack in furtherance of a plan under which all of

the other elements are present. Therefore, the act must occur in a context where a state's leadership has already shown the intent and ability to use force with a high potential destructiveness against another state.

Similarly, each of the other elements may be satisfied somewhat passively. For example, a simple conversation between a political leader and a military commander may satisfy the intent element. For countries that already lawfully possess weapons of mass destruction, the elements of ability and high potential destructiveness are met simply by that possession. In contrast, this last element requires a more recent and objectively measurable action in preparation for or in perpetration of the attack. However, temporal proximity between the act and the planned imminent attack is irrelevant. The act may occur much earlier than the expected kinetic effects of the attack. Any act that tends to further an attack satisfies this element.

C. Other Considerations

1. Proportionality of Pre-emptive Response in Self-Defense

A theory of pre-emptive self-defense should not abandon the customary requirement of proportionality. Any response in self-defense must be proportional to the imminent threat faced. However, given the requirement of a high level of potential destruction to this theory of self-defense, it follows that proportionality will likely mean that in many cases an extremely forceful defensive response would be justified. Nevertheless, there

are examples of factual scenarios where a relatively low level of force might be all that is required to completely neutralize the threat from an aggressor state. One example is the Israeli air strikes against the Osiraq nuclear facility where Israeli fighter jets were able to destroy the reactor with minimal loss of life.¹⁵² Where such minimum force is sufficient to completely neutralize the threat, only that amount is justified under the principles of self-defense.

Nevertheless, it is important to caution against a strict application of the element of proportionality, particularly when the defender is faced with annihilation or utter defeat and occupation by the aggressor. When faced with such an overwhelming force, the concept of proportionality must be applied in a context where the greater value of certainty in the ability of the defender to successfully repel the attack is recognized. Some room for imprecision in the calibration of the defensive response necessary to repel an attack must be excused as strongly preferable to a potentially low estimation of the amount of force needed by the defender. Allowing the defender little latitude in measuring its response increases the likelihood the defender will ultimately be defeated. Such a situation diminishes the relative risk of the attack incurred by the aggressor, and in so doing, also reduces the deterrent effect of pre-emptive self-defense. When faced with an overwhelming force whose exact strength is unknown, the application of that amount of counter-force required to ensure the best chance of decisive victory by the defender is justifiable pre-emptive self-defense. Therefore, a necessary corollary is the more overwhelming the attacker's force, the less meaningful the element of proportionality becomes.

¹⁵² Shoham, *supra* note 131, at 191, 222.

2. Necessity and Immediacy Included in Proposed Elements

To those who might ask whatever happened to Daniel Webster's requirements of necessity and immediacy as outlined in the *Caroline Case*, they are subsumed by definition within the elements of the aggressor's present intent and ability to cause high potential destruction to another state. As with proportionality, the concept of necessity is inherent in a situation where an aggressor intends to attack with weapons of mass destruction or other similarly powerful weapons that he currently possesses and has taken a step towards doing so. Though these elements could be enumerated separately, they would be redundant given their substantive incorporation into the proposed elements that require a dire factual scenario to justify pre-emptive self-defense. In applying the principle of necessity, it is important not to, as one commentator has described it, "habitually cast [the requirement of necessity] in language so abstractly restrictive as almost, if read literally, to impose paralysis."¹⁵³

3. Inaction When Elements are Present

It is important to note that in situations where the proposed elements are met, pre-emptive actions in self-defense need not be utilized by the defensive state. Though the legal justification may be present, there may be other practical considerations, either political or operational in nature, which may counsel against the use of pre-emptive self-defense measures. However, a state does not forfeit its right of self-defense simply

¹⁵³ MCDUGAL AND FELICIANO, *supra* note 36, at 217.

because it forbears on its right to employ the theory at some earlier time. The state retains the right of self-defense at all times while the elements are satisfied by proof beyond a reasonable doubt.

4. Risk of Enumerating Specific Elements

The author recognizes the inherent risk of enumerating the elements that must be present before the theory may be invoked. By listing the requirements for the theory's application, the international community is essentially providing a blueprint of the defense's limitations to those aggressor states that would threaten or attack other nations. Though true, this objection is no different than the notice provided by any legal norm agreed upon by the members of a community. There will always exist a tendency to "walk right up to the line without crossing over it." There are pros and cons to such a situation. Simply because the theory of pre-emptive self-defense may not apply to the facts of a particular situation, does not mean that traditional rights of self-defense won't apply at a later time in the continuum of aggression. For example, the leader of an aggressor state may have the present intent and ability to attack another, but may not possess the firepower necessary to be considered a threat of high potential destructiveness. In such an instance, the defender would have to proceed on a longer time-line toward a response in self-defense than it would if it were facing a high level of destruction, though it need not take the first punch. The greater the level of potential destructiveness, the earlier in time the defender may act to counter the imminent threat.

On balance, legitimacy and justice are furthered by clear and unequivocal notice of the standards of conduct expected by the international community. The value of unambiguous standards more than outweighs the negative possibility of states utilizing this line drawing to determine how to calibrate their unlawful aggression. Clear standards allow states to strike a careful balance designed to help eliminate the most dangerous manifestations of force and at the same time limit the potential for abuse of the doctrine.

D. Rationales for Pre-emptive Self-Defense

1. Potentially Decisive and/or Catastrophic Nature of a First Strike with Weapons of Mass Destruction

The advent of weapons of mass destruction during the twentieth century has fundamentally altered the concept of self-defense. As stated earlier, the concept of self-defense is essentially one of self-help.¹⁵⁴ It assumes that an attacked state will continue to possess the means with which to mount a defense. Weapons of mass destruction make this assumption extremely uncertain because of the possibility that the battle may be over before it has begun. If decisive results can be achieved by a surprise first strike, self-defense measures occurring after the damage has been done cease to be a meaningful option. The only course of action is to stop the attack at a point prior to which it has met

¹⁵⁴ Dinstein, *supra* note 20, at 175.

any of its ultimate objectives.¹⁵⁵ Pre-emptive self-defense allows a defender state to accomplish this result legally.

2. Greatly Diminished or Non-Existent Deterrent of Traditional Post-Attack Self-Defense Where Rogue States are the Aggressors

The many potential adversaries in existence today possess historically unique characteristics that greatly diminish the effect of traditional deterrents. Secretary of State Colin Powell described the new threat posed by rogue states possessing weapons of mass destruction and their terrorist allies as “a threat that [can] not be deterred.”¹⁵⁶ Pre-emptive self-defense restores some measure of deterrence. The following are a few of the characteristics of rogue states that help justify the theory of pre-emptive self-defense.

¹⁵⁵ President Bush, *supra* note 3. The President stated

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systematically break them. If we wait for threats to fully materialize, we will have waited too long. Homeland defense and missile defense are part of stronger security, and they're essential priorities for America. Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act. *Id.*

¹⁵⁶ Secretary of State Colin Powell, Testimony before the House Committee on International Relations, September 19, 2002, at <http://www.state.gov/secretary/rm/2002/13581.htm>. Secretary Powell stated, in relevant part:

Since September 11, 2001, the world is a different place, a more dangerous place than the place that existed before September 11 or a few years ago when the inspectors were last in. As a consequence of the terrorist attacks on that day and of the war on terrorism that those attacks made necessary, a new reality was born: the world had to recognize that the potential connection between terrorists and weapons of mass destruction moved terrorism to a new level of threat, a threat that could not be deterred, as has been noted; a threat that we could not allow to grow because of this connection between states developing weapons of mass destruction and terrorist organizations willing to use them without compunction and in an undeterrable fashion. *Id.*

a. Low Level of Infrastructure/Few High-Payoff Targets

The proliferation of advanced technology and weaponry has enabled relatively unsophisticated political and military organizations to become very dangerous quickly and inexpensively.¹⁵⁷ Deterrence of such organizations is extremely difficult because they have relatively few pieces of military or industrial infrastructure that might be the target of a response in self-defense. Therefore, a response in self-defense that counters the aggression before its fruition is the only type of meaningful deterrence remaining. If the potential aggressor state knows it may be the lawful target of self-defense measures before it has realized any return from its aggression, it is more likely to decide against aggression.

b. De-centralized or Highly Mobile Command and Control

Similarly, where the potential adversary operates a highly de-centralized or mobile command and control apparatus, the classical self-defense response to an attack is more likely to fail. Without the ability to counter the enemy as he plans, organizes, and

¹⁵⁷ President Bush, *supra* note 3. The President stated:

In defending the peace, we face a threat with no precedent. Enemies in the past needed great armies and great industrial capabilities to endanger the American people and our nation. The attacks of September the 11th required a few hundred thousand dollars in the hands of a few dozen evil and deluded men. All of the chaos and suffering they caused came at much less than the cost of a single tank. Id.

See also generally Charles J. Dunlap, Jr., *How We Lost the High-Tech War of 2007: A Warning from the Future*, THE WEEKLY STANDARD, 22 (January 29, 1996) (Discussing the inherent vulnerabilities in the information age of societies and militaries dependent upon technology which is also readily available to their adversaries).

executes his attack, a defender is left in the unenviable position of waiting for a certain attack the timing and whereabouts of which are unknown. Even more disconcerting is the prospect that even once damage has occurred, there may be little to no ability to locate the attacker. The only deterrent to a highly de-centralized or mobile command and control is the ability to defeat it with stealth prior to its attack on the defending forces.

c. Suicidal Approach to Warfare

Finally, when the aggressor state has operatives who practice a suicidal method of warfare, a pre-emptive defensive stance is the only solution that allows for a possible outcome where the defender loses no personnel or property to the attack. It seems intuitively obvious that a suicide bomber is highly likely to meet with success unless those defending against him are able to utilize pre-emptive measures against his attack because, once the attack has commenced, there is no longer any attacker to defend against. The suicide bomber does not have to worry about force protection. It is antithetical to his mission and therefore, absent a theory of pre-emptive self-defense, gives him an insurmountable advantage in conducting that type of "warfare."

Furthermore, such tactics are generally conducted by very small groups of operatives who are extremely difficult to track with any degree of success. Not only is pre-emption the most practical approach, it is the most just approach as well. It is counterintuitive to the concept of self-defense that a nation faced with threats from those whose method of warfare owes its success to a lack of regard for the lives of its own operatives should

legally have to wait until some of its own citizens are lost before mounting a defense. By definition, such a defense has already met with a significant degree of failure prior to its employment.

E. Responses to Potential Weaknesses of the Theory of Pre-emptive Self-Defense

1. Danger of World-Wide "Free Fire" Zone

The potential for widespread abuse of a doctrine of pre-emption is not lost on the author. The potential downside of such abuse is immense. It is easy to imagine a world where age-old enemies utilize pre-emptive self-defense as a subterfuge for their unlawful acts of aggression. However, the downside of pre-emption is substantially outweighed by that associated with a restrictive rule of international law prohibiting any nation from acting in self-defense unless or until it has incurred loss of life, property, or territory at the hands of an attacker. Furthermore, states motivated solely by self-defense considerations should retain some element of surprise in dealing with aggressor states.

Realistically, it is a certainty that some states will use this doctrine in bad faith. But others will also possess the right to take positive action to counter aggression with potentially unspeakable consequences. The added deterrent effect of pre-emptive self defense is, on balance, worth the risks of bad faith application of the doctrine. The reasoned analysis of the community of nations will always be the final arbiter of whether

actions in self-defense have been undertaken legally. So, although the theory may be available, the factual circumstances will ultimately determine its legal application.

2. Diminished Influence of United Nations in Dispute Settlement/Threat

Neutralization

This objection is the classic “straw man” argument. The concept of self-defense is written into the United Nations Charter because it is an inherent right of all nations to exercise self-help measures to protect their citizens and territory. Defining when the right of self-defense begins is not an easy task, but we shouldn’t assume that a broad construction of the right runs counter to the authority of the United Nations in general or the power of the Security Council in particular. Recognizing the legitimacy of pre-emptive self-defense does not diminish the enumerated responsibilities of the Security Council to deal with threats to the peace and to take measures necessary to counter threats of aggression. Instead, due to the nature of the threats implicating the right of pre-emptive self-defense, initially states have a broader mandate to act unilaterally. Ultimately, however, the United Nations and its Security Council retain the power to determine the validity of claims of self-defense and to take corrective action including the use of force where states abuse the inherent right of self-defense.¹⁵⁸ This power is identical to that which the United Nations possesses in dealing with any state that uses force in a manner not in compliance with the Charter’s provisions in Articles 2(4) and 51. It does not follow that such power is sufficient with respect to checking aggression in a

¹⁵⁸ MCDUGAL AND FELICIANO, *supra* note 36, at 237. Arguing that “[w]hether the events that precipitate the claim of self-defense constitute an actual, current attack or an imminently impending attack, the claim remains subject to the reviewing authority of the organized community.” *Id.*

general sense but not aggression couched erroneously in terms of self-defense. The Security Council's power to determine the veracity of the alleged facts underlying a claim of self-defense remains intact. Since self-defense is the only potentially authorized use of force absent that specifically authorized by the Security Council, the broad recognition of a theory of pre-emptive self-defense does not limit the power of the United Nations in any way. The organization retains all of its power to check abuses of the use of force including those characterized in bad faith as self-defense.

IV. Conclusion

When used to modify the concept of self-defense, the terms “pre-emptive,” “anticipatory,” and “interceptive” unnecessarily confuse the issue of when self-defense measures may be employed by one state against another. By suggesting that the existence of these various “types” of self-defense is in some way different from, or an extension of, the age-old concept of self-defense, the debate on this subject has largely, and erroneously, been framed as an expansion of the right of self-defense. This couldn’t be further from the truth. Instead, these terms describe various points along a temporal continuum of aggression during which an attacked state has the legal right to employ force in self-defense to counter the actions of the aggressor state before the aggressor has successfully inflicted harm upon the defender.

The relevant issue is reduced to when does an “armed attack” under Article 51 occur thus triggering the right of self-defense. Unfortunately, neither the plain language of the United Nations Charter nor its interpretation by the International Court of Justice’s decision in *Nicaragua v. U.S.* provides a clear and workable definition of “armed attack”.

This paper proposes a broader definition of “armed attack” than has been recognized historically. As we have seen, the practice of states contains examples of the employment of self-defense measures at a point on the continuum where the attacked state has not yet lost any life, property, or sovereignty at the hands of the aggressor. Does this somehow convert the purported defender into an aggressor? No, not if there exists

objective evidence beyond a reasonable doubt of the 1) intent and 2) ability of another state to attack with 3) great destructive force, and 4) the attacking state has taken some step toward that end. When all of these criteria are present simultaneously, an "armed attack" has occurred and the right of self-defense has vested.

The concept of pre-emptive self-defense has never been more necessary than in today's world characterized by weapons of mass destruction. During the twentieth century, the line of demarcation distinguishing a state of peace and one of war came to be defined instantaneously and after which there often can be no meaningful or deterrent response in self-defense. The overwhelming and instantaneous nature of moving from a state of peace to attack by nuclear, biological, or chemical weapons is fundamentally different in degree from the classic example of a massive army moving across the frontier of its border with another state. Though such an imminent invasion would also justify the use of force in pre-emptive self-defense, the principle applies *a fortiori* to attacks by nuclear, biological, or chemical weapons with the potential to instantly kill hundreds of thousands or millions. Absent a theory of pre-emptive self-defense, such attacks render non-existent the prospect of meaningful defensive recourse by the state attacked.

A more restrictive view of self defense vests potential aggressors possessing the most lethal weaponry with the unfettered capability of delivering the knock-out punch when and where they decide. If we apply the law as some have construed it, we create a dilemma where a defender state must choose between acquiescing to its potential destruction and violating international law. Where the law places a defender in that

position, the law must change or it will quickly become obsolete. No state will choose obeying the law over its very existence.

To those who argue pre-emptive self-defense creates a worldwide free fire zone, it is unclear that the use of force is any more prevalent under a legal regime recognizing a theory of pre-emptive self-defense than under one where self-defense may be employed only after death and destruction has occurred in the defending state. If anything, it seems the definition of self-defense espoused here results in less state-on-state use of force by creating an additional deterrent to the use of force by aggressor states. By making the potential defensive response earlier and therefore the outcome more uncertain and costly to the aggressor, pre-emptive self-defense results in fewer aggressors willing to risk a pre-emptive response to their plans.

Clearly, any legal regime that affords a competitive advantage to potential aggressors relative to those who would defend against them creates an incentive to attack first, utilizing the element of surprise. Such a scenario results in a more prevalent use of force between states and a much greater likelihood that the initial use of force is committed by bellicose states whose lack of adherence to Article 2(4)'s proscription on the use of force also allows them a competitive advantage in their relations with peace-loving states. By allowing a forceful response in self-defense earlier in the continuum of aggression, the cost-benefit analysis employed by the potential aggressor is more likely to render a decision not to use force.

Conceding that some abuses of pre-emptive self-defense will occur as they always have, nevertheless, on balance, allowing the defender the ability to be more proactive in its defense will result in less armed conflict overall. Bad faith application of the theory is an acceptable risk to incur in an effort to create a legal regime where the use of force is always a lawful course of action for states with purely defensive motivations.

In recognizing a theory of pre-emptive self-defense, it is imperative that we not discount the desirability of informing the appropriate organizations of the international community and utilizing their procedures to respond to aggression. Multi-lateral solutions to aggression are vastly preferable to unilateral action and should be undertaken whenever possible and appropriate to the situation. Nevertheless, the operative words here are "whenever possible."

The formulation of pre-emptive self-defense articulated here will apply only in relatively rare circumstances. Nevertheless, when those situations arise, nations must be afforded the legal authority to act unilaterally in pre-emptive self-defense. The international community's recognition of the full breadth of the concept of self-defense will undoubtedly contribute to a world where peace-loving states can adequately protect themselves, the aggressive use of force is less likely to occur, and the ideals of the United Nations' Charter will prevail in action as well as in words.